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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1161.

THE UNITED STATES, APPELLANT,

vs.

JOSEPH McDONALD.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 1, 1888.

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1 I.—*Claimant's petition.*—*Filed Sept.* 13, 1884.

In the Court of Claims of the United States.

JOSEPH McDONALD
vs.
THE UNITED STATES. } No. 14460.

To the honorable the judges of the Court of Claims:

The petition of Joseph McDonald respectfully shows to your honors: That he was a boatswain in the United States Navy from the 21st day of June, 1876, to the 19 day of July, 1876; that he was ordered by proper authority to proceed from Callao, Peru, to his home at Washington, D. C., via ; that he did so proceed, in compliance with said orders, and upon public duty, in a conveyance not belonging to the United
2 States Government, via Panama and New York, said route being the one usnally travelled, and the most direct one, and that the distance so travelled is 4,600 statute miles.

Your petitioner further shows that his actual expenses by the route so travelled as aforesaid, amounting to $256.60 were paid by the defendants; and that no further allowance was made him on account of said travel.

Your petitioner claims that he was entitled, under the act of Congress approved June 30, 1876 (Stats. 19, p. 65), to receive 8 cents per mile for the distance so actually travelled, but that he has only received the sum of $256.60, as aforesaid.

Wherefore your petitioner prays judgment against the United States in the sum of $111.40.

Your petitioner further shows that he is the sole owner of this claim; that he has made no assignment of any portion thereof; that he is justly entitled to the amount herein claimed, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has never in any way voluntarily aided,
3 abetted, or given encouragement to rebellion against said Government; and that he has appointed John Paul Jones, of 1420 New York avenue, Washington, D. C., his attorney for the prosecution of this claim.

JOSEPH McDONALD,
By JOHN PAUL JONES,
His Attorney.

John Paul Jones, being first duly sworn according to law, on his oath, says that he is the attorney of Joseph McDonald; that he signed the foregoing petition; and that to the best of his knowledge and belief the matters and things therein contained are true.

JOHN PAUL JONES.

Subscribed and sworn to before me this 11th day of September, 1884.
CHARLES S. BUNDY,
Notary Public.

4 II.—*General traverse.*—*Filed Sept.* 13, 1884.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every

allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant, a boatswain in the Navy, on the 21st June, 1876, was ordered by Rear-Admiral Werden, commanding at Callao, Peru, "to proceed to your home in the United States, and, upon your arrival, report to the honorable the Secretary of the Navy."

II.

The claimant, pursuant to the foregoing order, traveled from Callao to Washington and reported as directed. His journey from Callao to Panama was made prior to the 30th June, 1876; his journey from Panama to Washington subsequent to the 30th June, 1876. He was paid his actual traveling expenses for the entire journey, amounting to $256.60.

III.

If the claimant was entitled to mileage from Callao to Washington, the excess of such mileage over and above the amount paid to him for actual expenses is $111.40. If the claimant was entitled to mileage from Panama to Washington, the excess of such mileage over and above the amount paid to him for actual expenses is $74.

CONCLUSION OF LAW.

The claimant was entitled to mileage for so much of his journey as was performed subsequent to the enactment of the act 30th June, 1876 (19 Stat. L., p. 65), and should recover the balance remaining unpaid, viz, $74.

IV.—*Opinion.*

Per curiam. By the act 16th June, 1874 (18 Stat. L., p. 72, § 1), "only actual traveling expenses" were "allowed to any person holding

employment or appointment under the United States." By the act 30th June, 1876 (19 Stat. L., p. 65), so much of the preceding act as was "applicable to officers of the Navy" was "repealed," "and the sum of 8 cents per mile" was "allowed such officers" "in lieu of their actual expenses."

6 In the present case, where a naval officer was ordered to proceed from Callao to Washington, a part of the journey was made under the one statute and the remainder under the other; and the question presented by the case is whether the officer should be re-imbursed according to the law as it existed when the order to travel was given, or according to the law as it existed when the service of travel was completed, or whether the expenses should be re-imbursed according to the law actually existing at the time that each portion of the journey was made.

The court acknowledges that this question, though trivial, is not free from doubt; that there is neither precedent nor analogy which can be deferred to as authority; and that the question is one as to which different minds will reach different conclusions. But the court is of the opinion that the re-imbursement of an officer in such a case should be apportioned under both statutes, so that he shall receive mileage for that portion of his journey which was performed under the mileage act, and his actual expenses for that portion which was performed under the other statute. In the present case the difference between the amount of the mileage from Callao to Washington and the actual expenses already refunded to the officer is $111.40; and the court, for want of more minute data, will apportion this balance so that the officer shall recover such proportion of it as the distance from Panama to Washington bears to the whole distance from Callao.

The judgment of the court is that the claimant recover $74.

7 V.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 6th day of February, A. D. 1888, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge and decree that the said Joseph McDonald do have and recover of and from the United States the sum of seventy-four dollars ($74.00).

8 VI.—*Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 6th day of February, 1888, in favor of claimant, the defendants, by their Attorney-General, on the 6th day of March, 1888, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed March 6, 1888.
Allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

9 In the Court of Claims.

VII.

JOSEPH McDONALD
vs.
THE UNITED STATES. } No. 14460.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this sixth day of September, 1888.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1161. The United States, appellant, vs. Joseph McDonald. Court of Claims. Filed October 1, 1888.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
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APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT POR APPELLANT.

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No. 1161.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT FOR APPELLANT.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims against the United States in favor of Joseph McDonald for the sum of $74. The claimant, a boatswain in the Navy, on the 21st of June, 1876, was ordered by Rear-Admiral Worden, commanding at Callao, Peru, "to proceed to your home in the United States and upon your arrival to report to the honorable the Secretary of the Navy."

In pursuance of this order, claimant traveled from Callao to Washington and reported as directed.

He was paid his actual traveling expenses for the whole journey, amounting to $256.60.

By the *Act 16th June*, 1874 (18 Stat., p. 72, Par. 1), "only actual traveling expenses" were "allowed to any person holding employment or appointment under the United States."

By *Act of 30th of June*, 1876 (19 Stat., p. 65), so much of the preceding act as was "applicable to officers of the Navy" was "repealed," and "the sum of 8 cents per mile" was "allowed such officers in lieu of their actual expenses."

When claimant received his orders and started from Callao in pursuance thereof, the act of 16th of June, 1874, *supra*, was in force; at the time of his arrival in Washington the act of 30th June, 1876, had been enacted.

The question at issue in the court below was whether claimant should be paid under the provision of the law in force when the order to travel was given, or under the law existing when the travel had been accomplished.

Under the law in force at the time the travel commenced claimant has been paid his actual traveling expenses.

If claimant is entitled to mileage from Callao to Washington the excess of such mileage over actual traveling expenses is $110.40. If entitled to mileage from Panama to Washington, the excess of such mileage over and above the amount paid him for actual expenses is $74.

The court below found as a conclusion of law that claimant is entitled to mileage for so much of his journey

from Callao to Washington as was performed subsequent to the enactment of the act of June 30, 1876, *supra*. Judgment was rendered for the sum of $74.

ASSIGNMENTS OF ERROR.

The court erred—

(1) In finding as a conclusion of law that claimant is entitled to mileage for so much of his journey as was performed subsequent to the enactment of the *Act of June* 30, 1876 (19 Stat., p. 65), and should recover the balance remaining unpaid, viz, $74.

(2) In rendering a judgment in favor of claimant and against the United States for $74.

BRIEF OF ARGUMENT.

Unless where there be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is condition precedent; being one consideration and one debt, it can not be divided. (*Packet Company* v. *Sickles*, 10 Howard, 419.)

The journey from Callao to Washington was a single service, rendered under a single order. The service, it is true, was for the benefit of the claimant. By reason of sickness he was ordered home on sick leave. But as in his journey he acted under orders, he was entitled to be allowed his actual traveling expenses, under the provisions of act of June 16, 1874, *supra*.

The actual traveling expenses of claimant, it is admitted, have been paid.

Whilst en route the act of June 30, 1876, was passed.

Claimant asserts that as until he had performed the travel he had no right to re-imbursement, he was entitled to be re-imbursed by the law in force at the time of payment.

This is not the law governing the payment of contracts. The travel from Callao, Peru, to Washington was performed under an order made whilst the law of 1874, *supra*, was in force.

Whether, if the terms of the law of 1876 had then been in force, such order would have been made can not be known. That claimant should make the journey, only receiving actual expenses, was regarded as a benefit to the service under the law of 1874. Whether the order would have been made if the law of 1876 had then been in force can not now be determined.

The order was made and the travel undertaken with the understanding that only actual expenses should be paid. On such terms claimant undertook the journey. The law of 1876 is not retroactive in its character.

The rule as to payment under a contract is that the terms under which the work is undertaken shall control the amount to be paid.

It is respectfully submitted that as claimant received his contract price for travel performed, and that the judgment of the court below be reversed, with directions that the petition should be dismissed.

ROBERT A. HOWARD,
Assistant Attorney-General.
F. P. DEWEES,
Assistant Attorney.

Supreme Court of the United States.

OCTOBER TERM 1888.

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vs.
JOSEPH McDONALD. } No. 1161.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

ROBERT B. LINES,
JOHN PAUL JONES,
Counsel for Appellee.

MILANS, LAW PRINTER, 519 7TH STREET, N. W.

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